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No. 04-1465

IN THE

Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC. d/b/a LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. d/b/a SUBARU OF CLAREMONT; CAMILLERI BROTHERS, INC. d/b/a C&C SUBARU; KINNEY MOTORS, LTD; REYNOLDS' GARAGE & MARINE, INC.,

Petitioners,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH; JOSEPH A. APPELBE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents believe Petitioners' statement of the Question Presented mischaracterizes the case. The question presented is whether an automobile distributor may, consistent with the "good faith" requirement of the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221, *et seq.*, offer dealers extra cars, in addition to those to which they are contractually entitled, in order to promote the sale of more fully equipped vehicles.

CORPORATE DISCLOSURE STATEMENT

Respondent, Subaru of New England, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

A. Proceedings Below

Petitioners allege that the defendant automobile distributor, Subaru of New England, Inc. ("SNE"), used cars outside its vehicle allocation system, known as "discretionary" and "turndown" cars, to coerce its dealers to purchase unwanted accessories. In their Second Amended Complaint, Petitioners, on behalf of themselves and a class of present and former New England Subaru dealers, allege, *inter alia*, that SNE violated the "good faith" requirement contained in the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221-1225 ("ADDCA"), and prohibitions against coercion contained in the state automobile dealer statutes of each of the six New England states in which the class members and SNE do business.

The undisputed fact that dealers were not entitled to these "extra" cars disposed of Petitioners' claims. Because the dealers had no entitlement to cars outside their earned allocations, both of the lower courts held that the allegation that SNE conditioned access to these extra cars on dealers' purchases of accessories could not, as a matter of law, constitute unlawful coercion. In doing so, the courts relied on a longstanding test that has been adopted by every Circuit that has defined "coercion" under the ADDCA, and on two federal court decisions that rejected virtually identical claims of coercion based on a manufacturer's withholding of extra cars.

1. The District Court Decision

The district judge who presided over this very active litigation for over four years entered summary judgment for defendants based on his thorough review of an extensive summary judgment record and the application of a uniform body of federal and state dealer law. In rejecting plaintiffs' claim of unlawful coercion, the court held:

> As I have noted, coercion under both the ADDCA and the state dealer acts requires a wrongful demand coupled with a threat of sanctions. The clearest cases of coercion under this definition are those in which a manufacturer threatens to withhold what it knows to be a dealer's property if the dealer refuses to comply with the manufacturer's demands. Such conduct necessarily is coercive because the manufacturer is using an unlawful threat to induce compliance with the manufacturer's demands. In contrast, a manufacturer's offer of incentives to induce compliance ordinarily is not coercive because the dealer has no entitlement to the property that the manufacturer is offering to provide. See, e.g., Cabriolet Porsche Audi, Inc. v. American Honda Motor Co. 773 F.2d 1193, 1210 (11th Cir. 1985) (offer of extra vehicles from a pool of discretionary vehicles is not coercive); Colonial Dodge, 11 F. Supp.2d at 744 (same). This case appears to qualify as a permissible use of incentives rather than an impermissible use of sanctions under this dichotomy because plaintiffs agree that they had no contractual right to receive either turndown or discretionary vehicles.

Petition, p. 55.

2. The Court of Appeals Decision

In a unanimous decision, the court of appeals affirmed the district court's entry of summary judgment for the defendants. Relying on its established precedents, the court began:

> In interpreting ADDCA's good faith provision, "[t]his court has read the requirements of the ADDCA very narrowly to require 'actual or threatened *coercion* or intimidation.'" *General GMC, Inc. v. Volvo White Truck Corp., et al.*, 918 F.2d 306, 308 (1st Cir. 1990) (quoting *H.D. Corp. of Puerto Rico v. Ford Motor Co.*, 791 F.2d 987, 990 (1st Cir. 1986) (emphasis added).

Petition, p. 26. Again relying on prior cases, the court recited the universally recognized test for coercion under the ADDCA:

> This Court has held, and we again emphasize, that "coercion or intimidation [under the ADDCA] must include a wrongful demand that would result in penalties or sanctions if not complied with." *Wallace Motor Sales, Inc. v. American Motors Sales Corp.*, 780 F.2d 1049, 1059 (1st Cir. 1985) (agreeing with several other circuits that "coercion or intimidation must include a wrongful demand which will result in sanctions if met.")[*sic*] That is, to state a cause of action under the ADDCA, the aggrieved dealer must produce evidence that the manufacturer or distributor (1) made a wrongful demand, coupled with (2) sanctions, or threat thereof. *Id.* at 1056. Otherwise, summary judgment is warranted if the

> dealer "has produced no evidence showing that it was subjected to coercion or intimidation" by the manufacturer or distributor. *General GMC*, 918 F.2d at 308.

Petition, p. 26 (footnote omitted).

Applying this standard, the unanimous court agreed with the district court's conclusion that Petitioners had failed to show coercion under the ADDCA. It held:

> Viewing the evidence in the light most favorable to appellants, we find that SNE's conduct does not amount to coercion within the meaning of ADDCA. We simply fail to see how SNE's practice of conditioning access to, or accessorizing, discretionary and turndown cars – cars which dealers concede they had no contractual right to receive – constitutes coercion.

Petition, p. 27.

In reaching this result, the court discussed the decisions in *Cabriolet Porsche Audi, Inc. v. American Honda Motor Co., Inc.*, 773 F.2d 1193 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986), and *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd*, 121 F.2d 697 (4th Cir. 1997). Both of these cases "found no coercion for various conditions imposed by distributors for dealers' access to vehicles which they were not entitled to receive." Petition, pp. 27-28. Like the district court, the court of appeals adopted the reasoning of these decisions:

> We find these cases persuasive, and thus hold that a manufacturer's conditioning of access to vehicles

> beyond the regular allocation process, without more, does not amount to a "wrongful demand" that would constitute coercion under ADDCA's good-faith requirement. Since dealers are not contractually entitled to these extra vehicles, a manufacturer's decision to impose reasonable conditions for dealer access is neither "wrongful" nor even a "demand." These conditions are not wrongful because they are part of a bargained-for exchange (e.g., accessories for extra cars, taking less-desirable cars to access discretionary highly desirable cars); neither do these conditions constitute a "demand" because dealers need not take these extra cars. Rather, these conditions constitute reasonable business judgments in a free market economy, and "[a] distributor acting honestly is entitled to latitude in making commercial judgments." *Coady Corp. v. Toyota Motor Distrib., Inc.*, 361 F.3d 50, 56 (1st Cir. 2004).

Petition, pp. 28-29.

The panel denied plaintiffs' petition for rehearing, and the full court denied their petition for rehearing *en banc*. Petitioners now seek a writ of certiorari on their claim under the ADDCA.

B. Statement of Facts

1. Respondents' Statement of Undisputed Facts

The undisputed evidence contained in the record portrays a very different picture of SNE's practices from the unsupported assertions set forth in the Petition. The following is a brief recitation.

Since 1971, SNE has been the independent, exclusive regional distributor of new Subaru automobiles in the six New England states. Court of Appeals' Appendix ("CA App.") 0929. It purchases Subaru products from Subaru of America, Inc., ("SOA"), the exclusive United States distributor, and resells them to approximately 60 dealers with whom it has entered into dealership agreements. SNE competes with other regions for allocations of cars from SOA, and with other brands for new car sales in the New England market. It earns cars under SOA's allocation system based on the rate of its dealers' new car sales. CA App. 0907-08. Thus, SNE's success very much depends on the success of its dealers in selling their cars. It is undisputed that SNE's dealers enjoyed great success and profitability during the class period compared to Subaru dealers in other parts of the country and dealers of other brands. CA App. 1492-93, 1506-07.

Since the 1980s, SNE has distributed automobiles to its dealers through a formula known as "Fair Share II." As part of Fair Share II, SNE reserved the right to withhold up to fifteen percent of Subaru Legacy models, and up to ten percent of all other models, from the dealers' allocations and to treat them as "discretionary cars." CA App. 1168, 1199. The remaining 88.5% of the cars were offered to dealers based on a formula that took into account the number of cars each dealer sold and the number of cars in each dealer's inventory. CA App. 1150-56. SNE offered these "regular allocation" cars to dealers without accessories, but the dealers could choose to have accessories added by SNE.

Dealers were not required to purchase the cars SNE offered to them. Dealers often declined to purchase some of their regular allocation cars, and SNE attempted to sell these

"turndowns" to other dealers before the close of each allocation. CA App. 0293-92, 0557, 0567. Turndown cars that were not sold during an allocation were treated in the same manner as discretionary cars.

During dealer orientations, SNE informed dealers that discretionary cars were not part of the dealers' earned allocations and that the cars belonged to SNE. CA App. 1326-27. Dealers uniformly admitted at deposition that they understood that they had no entitlement to discretionary or turndown cars, and that they did not make investments in their dealerships based on any expectation of receiving them. CA App. 0348-49, 0368-78, 0436, 0454, 0528, 0541, 0592, 0615, 0655-56, 0759-60, 0811, 0829-30, 0855, 0889-91.

SNE used discretionary cars for a variety of purposes, such as providing initial supplies of cars to new dealers, rewarding upgrades in dealers' facilities, and helping dealers to fill retail orders for cars that dealers did not have in inventory. CA App. 0282-85, 0304-05, 2252-56. Discretionary cars not used for these purposes were offered to dealers based on SNE's business judgment of where the cars were most likely to sell. *See, e.g.*, CA App. 0287-88, 0558, 0568-69, 2253.

When dealers ordered cars from their regular allocations, they could also choose to order a number of accessories, which SNE would then install on the cars before the dealers took delivery. Although dealers could purchase their regular allocation cars without accessories, they testified that they often purchased accessories on their regular allocation cars voluntarily and in the exercise of their own business judgment, and that the accessories that SNE installed on their

cars both helped to sell the cars and were profitable in their own right. CA App. 0265-70, 0433-36, 0475-80, 0524, 0528, 0595-96, 0613, 0617-19, 0751-53, 0770, 0815, 1314-15. When it selected accessories for discretionary and turndown cars, SNE considered what it had in inventory, but it also selected accessories based on its business judgment concerning current market demand and the promotion of the Subaru brand in New England, consistent with its own economic interest in promoting the dealers' sales. CA App. 0297-301, 0494-99, 0502-03, 0912-14, 0918-19, 0922.

2. Petitioners' Mischaracterizations of the Record

Petitioners' admitted lack of entitlement to the discretionary and turndown cars disposed of their claims of unlawful coercion. Nevertheless, they sought refuge in the lower courts, as they do here, in the assertion of facts finding no support in the record.

For example, Petitioners did not "establish[] that discretionary and turndown cars were simply loaded with whatever was leftover in the warehouse and could not otherwise be sold," Petition, p. 4, and the record does not support this assertion. Nor did the dealers produce "undisputed evidence that the accessories were undesirable, made the cars harder to sell and their cost could not be passed on to consumers." Petition, p. 5. The accessories at issue in this lawsuit included such desirable items as mud guards, floor mats, stereo upgrades, dimming mirrors, roof racks, spoilers, and leather seating – the types of accessories frequently ordered by consumers and commonly found on cars of many makes and models. Indeed, as the district court observed at the summary judgment hearing, there was no evidence that the accessories installed on discretionary and

turndown cars were any different from the accessories that dealers voluntarily ordered on the cars in their earned allocations. CA App. 3002. At deposition, dealers were unable to identify specific instances where they purchased unwanted or undesirable accessories that were sold at a loss. CA App. 0789, 0659-60, 0839, 0273-74, 0756-57, 0523-24. Plaintiffs' expert economist, whose testimony was the only evidence Petitioners proffered to demonstrate that they suffered economic harm, admitted in his deposition that he did not examine any information about the prices at which the cars were sold or the profits dealers made on the sales. CA App. 0719. For these reasons, the district judge concluded that he would not allow the expert "to express any testimony that in my opinion they lost money . . ." CA App. 2964.

Similarly, Petitioners produced no evidence that any member of the dealer class was ever "caught in a downward allocation spiral which would jeopardize their ability to achieve their required sales performance," Petition, p. 6. As the district court held, "the record is devoid of evidence suggesting that SNE's conditioning practices threatened any dealer's ability to conduct successful business operations." Petition, p. 57.

In addition to asserting unsupported facts, the Petition distorts the record. For example, Petitioners repeatedly assert that "the dealers had no real choice but to purchase the 31.5% of cars that SNE denominated as 'turndown' or 'discretionary,' with the unsalable accessories pre-installed." Petition, p. 5. Apart from the absence of evidence that the pre-installed accessories were unsalable, this assertion overlooks the fact that two-thirds of these "extra" cars were originally offered to dealers without pre-installed accessories as part of their regular allocation and were then turned down.

The dealers to whom they were originally offered not only had the choice to buy the cars without accessories, but exercised that choice by refusing to buy the cars at all.

ARGUMENT

A. The Decision Below Is Fully Consistent With the Decisions of All Other United States Courts of Appeals Interpreting "Coercion" Under the ADDCA

1. The Courts of Appeals Have Uniformly Applied the Same Test Applied By the Court Below

All four judges that have considered this matter applied the accepted definition of "good faith" under the ADDCA to conclude that plaintiffs are not entitled to relief. Their conclusions were based on the test that the First Circuit adopted twenty-years ago in *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, that, in order to establish a violation of the ADDCA's "good faith" standard, a dealer's proof of coercion "must include a wrongful demand that would result in penalties or sanctions if not complied with." 780 F.2d 1049, 1056 (1st Cir. 1985). As the court held in *Wallace Motor Sales*:

> This is the first time the meaning of this provision has come up for review in this circuit. Other circuits, however, have unanimously held that the failure to exercise good faith under the Act has a limited and restricted meaning; lack of good faith does not simply mean unfairness, it must be found in the context of actual or threatened coercion. . . . Several circuits have also held that the coercion or intimidation must include a wrongful demand which will result in sanctions if met. [*sic*]

> . . . We agree with those circuits which hold that the coercion or intimidation must include a wrongful demand that would result in penalties or sanctions if not complied with. We also hold that the coercion or intimidation must be actual; the mere fact that a dealer may have felt it had been coerced or intimidated is not sufficient.

Id. (citations omitted).

This "wrongful demand/threat of sanctions" test has been adopted by every federal appellate court that has defined "coercion" under the ADDCA. *See Bob Willow Motor, Inc. v. General Motors Corp.*, 872 F.2d 788, 796 (7th Cir. 1989); *Dreiling v. Peugoet Motors of America, Inc.*, 850 F.2d 1373, 1379 (10th Cir. 1988); *Empire Volkswagen Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95-96 (2d Cir. 1987); *Wallace Motor Sales, Inc. v. American Motor Sales Corp.*, 780 F.2d 1049, 1059 (1st Cir. 1985); *American Motor Sales Corp. v. Runke*, 708 F.2d 202, 207 (6th Cir. 1983); *H.C. Blackwell Co. v. Kenworth Truck Co.*, 620 F.2d 104, 107 (5th Cir. 1980); *Francis Chevrolet Co. v. General Motors Corp.*, 602 F.2d 227, 229 (8th Cir. 1979); *Autohaus Brugger, Inc. v. Saab Motors, Inc.*, 567 F.2d 901, 911 (9th Cir. 1978), *cert. denied*, 436 U.S. 946 (1978); *Rea v. Ford Motor Co.*, 497 F.2d 577, 585 (3d Cir. 1974), *cert. denied*, 419 U.S. 577 (1974). *See also Wooton Ent., Inc. v. Subaru of America, Inc.*, 34 Fed. Appx. 57, 62 (4th Cir. 2002) (unpublished).

As these decisions demonstrate, there simply is no conflict among the circuits regarding the "good faith" standard, and the Petition should therefore be denied.

2. Courts Have Uniformly Held That a Manufacturer's Use of Cars Outside Its Allocation System As Incentives For Dealer Conduct Is Not "Coercion" Under the ADDCA

Just as there is no conflict regarding the standard that applies, there is also no conflict among those courts that have considered the use of "extra" cars as incentives to dealers. Both of the lower courts held that the withholding of cars to which dealers are not entitled under SNE's allocation system in order to create incentives for additional purchases of accessories is not a wrongful demand accompanied by a threat of sanctions. In so holding, they expressly followed the fully consistent decisions of the only federal courts to have considered whether a manufacturer's use of such "extra" cars may constitute unlawful coercion. *Cabriolet Porsche Audi, Inc. v. American Honda Motor Corp.*, 773 F.2d 1193 (11th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986); *Colonial Dodge, Inc. v. Chrysler Corp.*, 11 F. Supp. 2d 737 (D. Md. 1996), *aff'd mem.*, 121 F.3d 697 (4th Cir. 1997). Because the dealers had no entitlement to the discretionary or turndown cars, SNE's alleged practice of conditioning access to the cars based on purchases of accessories was not coercive. As the Eleventh Circuit held in *Cabriolet*:

> All American Honda did was suggest to Cabriolet a way to obtain extra cars – that is, more cars than Cabriolet was entitled to receive. This does not amount to coercion.

773 F.2d at 1210. There is no contrary authority in any federal court, and no conflict among the courts of appeal that would warrant the issuance of a writ of certiorari.

3. The First Circuit's Earlier Decision in *Rohlsen* Did Not Establish an Inconsistent Test for Bad Faith

Petitioners concede that the "wrongful demand/threat of sanctions" test adopted by the First Circuit in *Wallace Motor Sales* and applied by the courts below is appropriate under the statute. Petition, p. 11 ("Coercion under the ADDCA is defined as the manufacturer's wrongful demand accompanied by threat of sanctions.") Despite this concession, they argue that "[j]ust how coercion is to be defined is the critical aspect of this case." They further argue that "the generally accepted rule of what constituted coercion under the Act" was decided in "the seminal ADDCA case, *Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F.2d 437 (1st Cir. 1966)." Petitioners' reliance on two sentences of dicta from a forty-year-old case misconstrues settled law and misstates *Rohlsen's* place in it.

The First Circuit in *Rohlsen* never purported to prescribe a test for bad faith, but simply discussed a type of conduct that would be "particularly suspect" under the Act. As the court explained unequivocally in this case:

> [A]ppellants' proferred 'test' is mere dicta; we merely explored two possible scenarios for a condition to constitute coercion under ADDCA's good-faith requirement. We never announced a test for coercion, and thus good faith, in *Rohlsen*.

Petition, p. 30. Indeed, Petitioners' characterization of *Rohlsen* as a "seminal case" defining "coercion" cannot be reconciled with the same court's statement nineteen years later in *Wallace Motor Sales* that "[t]his is the first time the meaning of [the ADDCA's 'good faith' provision] has come up for review in this circuit." 780 F.2d at 1056. The *Wallace*

Motor Sales standard of wrongful demand and sanction has been the standard in the First Circuit for twenty years, and the decision below does not represent "a radical change in settled law" as the Petitioners suggest. Petition, p. 17. Certiorari should not be based on a creative attempt to thrust on a precedent a significance it was never given and was never meant to have. Nor should it be based on an imagined inconsistency in the appellate decisions of a single circuit.

Petitioners' string cite of cases that quote *Rohlsen's* "mutual benefits" language does not demonstrate a conflict among the circuits. Petitioners cite appellate decisions from the Second and Tenth Circuits, but each of those courts subsequently adopted the same "wrongful demand/threat of sanctions" test applied by the court below. *Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 95-96 (2d Cir. 1987); *Dreiling v. Peugeot Motors of America, Inc.*, 850 F.2d 1373, 1379 (10th Cir. 1988). Indeed, four of the district court decisions and the one state court decision Petitioners cite explicitly apply the "wrongful demand/threat of sanctions" test. *See Bronx Chrysler Plymouth, Inc. v. Chrysler Corp.*, 2000 U.S. Dist. LEXIS 22130, *22 (S.D.N.Y. Aug. 31, 2000); *General Motors Corp. v. Villa-Marin Chevrolet, Inc.*, 2000 U.S. Dist. LEXIS 2772, *55-56 (E.D.N.Y. Mar. 7, 2000); *K & H Kawasaki, Inc. v. Yamaha Motor Corp., U.S.A.*, 1997 U.S. Dist. LEXIS 5171, *13-14 (N.D.N.Y. April 14, 1997); *Scuncio Motors, Inc. v. Subaru of New England, Inc.*, 555 F.Supp. 1121, 1134 (D.R.I. 1982), *aff'd*, 715 F.2d 10 (1st Cir. 1983); *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 792 N.E.2d 488, 497 (Ill. App. 2003). Most of these cases refer to the *Rohlsen* benefits language as simply one relevant factor in determining whether the "wrongful demand" prong of the two-prong test is met. This approach is not inconsistent with the decision below.

Petitioners' efforts to demonstrate an inconsistency by distinguishing the facts of *Cabriolet* and *Colonial Dodge* also fail. Petitioners argue that the manufacturers' conditions benefited the dealers in those cases, and that SNE's conditions benefited only SNE. No doubt, the dealer plaintiffs in those cases harbored the same belief that the action sought by the manufacturers did not benefit them as the Subaru dealers assert here. Indeed, the chart on page 16 of the Petition, in which Petitioners purport to compare the benefits to dealers present in *Cabriolet* and *Colonial Dodge* with the alleged lack of benefits to dealers present in this case, fails to account for the benefit to the dealer of gaining access to the extra cars to which the dealer was not entitled. The court of appeals, presented with the same chart, correctly observed that even under the *Rohlsen* language, "appellants fail to show that SNE's pre-accessorization practice lacks mutual benefit. Appellant dealers gained the additional benefit of cars that they were not otherwise entitled to receive and the additional profits that could be gained therefrom." Petition, p. 30. This is the same analysis applied by the Eleventh Circuit in *Cabriolet*. As that court held, the offering of extra cars to induce dealers to take desired actions amounts "to nothing more than 'recommendation, endorsement, exposition, persuasion, urging,' which under the federal act, 'shall not be deemed to constitute a lack of good faith.'" 773 F.2d at 1211. *See* 15 U.S.C. § 1221(e).

B. The Court Below Did Not Decide an Important Question of Federal Law that Should be Settled by This Court.

In addition to its consistency with uniform federal law, the court of appeals' application of the ADDCA's "good faith" provision to SNE's alleged accessorization practices does not implicate an important federal issue that merits this

Court's attention. Plaintiffs do not contend that the practices challenged in this case are being employed by other manufacturers. The Petition provides no basis for concluding that a decision by this Court would affect any other case or any other parties. It represents nothing more than a final effort by private litigants to salvage their monetary claims.

Even if this case concerned issues of importance to the automotive industry, however, the ADDCA is not the primary enforcement tool available to dealers. After passage of the ADDCA in 1956, states passed or amended their own statutes to regulate the relationships between automobile manufacturers and dealers in order to supplement the federal law. The state dealer laws regulate the relationships between automobile manufacturers and their dealers with more specificity than the federal act.

Petitioners argued below that the state laws' definitions of coercion were more protective of dealers than the ADDCA's definition. In support of that argument, they cited various authorities stating that the ADDCA did not provide sufficient protection to dealers, and that the states could, and did, "enact statutes that provided far more detailed regulation of automobile franchises than that contemplated by the ADDCA. . . ." Brief of Plaintiffs-Appellants, pp. 39-40.

The National Automobile Dealers Association ("NADA") submitted a Brief of Amicus Curiae in the Court of Appeals in support of the Petitioners in which it made a similar argument. NADA (which includes on its Board of Directors one of the Petitioners in this case) argued that automobile manufacturers dominated the franchise relationship from the 1920s to the 1950s, that this dominance allowed them to take unfair advantage of dealers, and that

dealers were unable to stop these practices through the application of contract law. According to NADA, the inability of the dealers to use contract doctrines to prevent unfair practices resulted in the passage of federal and state dealer laws. In its amicus brief in the court below, NADA argued:

> These unsuccessful attempts forced the dealers to turn to Congress and the state legislatures for protection. A principal target of these attempts was manufacturer coercion to force dealers to take unwanted vehicles, parts and accessories. . . . However, attempts to have this practice expressly declared illegal by Congress were unsuccessful. . . . Instead, Congress enacted the Automobile Dealer Day in Court Act, 15 U.S. C. §§ 1221 et seq., in 1956, which only generally protected dealers from acts of coercion or intimidation by manufacturers.
>
> After passage of ADDCA, the dealers were still unsatisfied, so they turned to the state legislatures seeking more specific protections. . . . Here, the dealers had more success in obtaining statutory protection against being coerced to order unwanted vehicles, parts and accessories. Today, there are laws that expressly prohibit manufacturers from coercing or requiring dealers to order unwanted vehicles, parts and accessories enacted in at least 35 states.

Brief of Amicus Curiae, pp. 6-7 (citations and footnote omitted).

Although the courts below correctly held that the definition of "coercion" under the applicable state statutes is identical to the definition of "coercion" under the ADDCA, neither the state legislatures nor the state courts

are bound by the ADDCA when interpreting their own laws. The availability of more pervasive state legislative schemes to protect dealer rights further limits the importance of the federal issues presented, and makes this case particularly unsuited for this Court's discretionary review.

Nor does the Act's legislative history assist the Petitioners. The House Report's reference to requirements by manufacturers that their dealers "sell a specified quota of parts, accessories, and tools made or approved by the manufacturer" has nothing to do with this case, where there is no allegation and no evidence that SNE imposed quotas or prohibited dealers from purchasing accessories from third parties. H.R. Rep. No. 84-2850 (1956), *reprinted in* 1956 U.S.C.C.A.N. 4596, 4603. Similarly, although the House Report refers to Congress' concern over manufacturers' pressuring dealers to accept unwanted automobiles, parts, accessories, or supplies, it goes on to state that such pressure "may in appropriate instances constitute coercion or intimidation." *Id.* Because Congress did not describe the circumstances that would give rise to a claim of coercion, the passage Petitioners partially quote adds no support to their contentions. Rather, the statute and the legislative history demonstrate that Congress was concerned only with manufacturers' coercing dealers to purchase unwanted products. They do not evidence any concern over the bargaining that takes place when a manufacturer offers a dealer one product as an incentive to purchase another. This type of bargained-for exchange, which dealers are free to decline, reflects precisely the balance between prohibiting coercion and preserving freedom of contract that is reflected in both the language and the legislative history of the ADDCA.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MOTION FILED
JUN 3 - 2005

No. 04-1465

In the Supreme Court of the United States

GEORGE LUSSIER ENTERPRISES, INC., d/b/a LUSSIER SUBARU; SULLIVAN COUNTY MOTORS, INC. d/b/a SUBARU OF CLAREMONT; CAMILLERI BROS., INC. d/b/a C&C SUBARU; KINNEY MOTORS, LTD. and REYNOLDS GARAGE & MARINE, INC.,

Petitioners,

v.

SUBARU OF NEW ENGLAND, INC.; ERNEST J. BOCH, JR. and JOSEPH APPELBE,

Respondents.

On Petition for Writ of Certiorari to the United State Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF BY NATIONAL AUTOMOBILE DEALERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Under Rule 37.2 of the Rules of the Court, the National Automobile Dealers Association ("NADA") moves for leave to file an amicus curiae brief in support of petitioners' petition for writ of certiorari. Consent from petitioners' counsel has been granted. Consent from respondents' counsel has been sought and denied.

NADA was founded in 1917 and is a non-profit national trade association of new motor vehicle dealers. It has over 20,000 members and represents over 43,000 separate franchises located in all 50 states. NADA appears as amicus curiae frequently in cases that raise important issues to its members or their customers.

In the United States, franchised dealers employ over 1.1 million people. In 2004, the average dealership had 52 employees and the annual payroll for all dealerships nationwide totaled $50.5 billion, representing almost 13 percent of the nation's total retail trade payroll. As these numbers reveal, motor vehicle dealers fuel a significant portion of the U.S. economy.

NADA members are protected by franchise laws enacted by Congress, which includes the statute at issue in this case, as well as state motor vehicle laws enacted in all 50 states. It is well established that these laws were promulgated in recognition of the "disparity of bargaining power between automobile manufacturers and their dealers" and that they were "intended to protect retail car dealers from abusive and oppressive acts by manufacturers." *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 439 U.S. 96, 100-01 (1978). NADA members have an obvious interest in the manner in which the courts construe these laws.

In this case, the issue before the Supreme Court is whether the Court of Appeals for the First Circuit erred in holding that the test for "coercion" under the Automobile Dealers Day in Court Act, 15 U.S.C. §§ 1221-1225, is based solely on contractual rights.

NADA believes that a "contractual rights" test for coercion contradicts Congress' intent of preventing manufacturers from abusing their superior bargaining power by drafting one-sided franchise agreements that permit them to take unfair advantage of their dealers. Moreover, the case law demonstrates that there is a split among the circuit courts regarding the proper test for "coercion" under the Act, including what constitutes a "wrongful demand" and what constitutes a "sanction."

Because NADA members are affected directly and materially by the interpretation of the federal statute at issue, NADA has monitored its development, amendment and enforcement since it was enacted in 1956. As a result, NADA's experiences give it a unique perspective from which to assist the Supreme Court on this important and conflicting issue of the interpretation of this federal statute, which affects a major economic industry in the United States.

Accordingly, NADA respectfully requests that the Court grant its motion for leave to file an amicus curiae brief in support of petitioners' petition for writ of certiorari.

Respectfully submitted,

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QUESTION PRESENTED

Is "coercion" by a motor vehicle manufacturer, which is prohibited under the Automobile Dealer Day in Court Act, 15 U.S.C. §§ 1221-1225, limited only to a violation of a motor vehicle dealer's contractual rights?

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